IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 6TH FEBRUARY 2007 / 17TH MAGHA 1928

CRL.A.No. 1377 of 2006()

SC.1168/2005 of ADDL.SESSIONS COURT-TRIAL OF ABKARI ACT CASES,NEYYATTINKARA

CP.171/2005 of JUDL. MAGISTRATE OF FIRST CLASS COURT-I, NEYYATTINKARA

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APPELLANTACCUSED:

RAJAN S/O.RAMAKRISHNAN,
C.NO.514, CENTRAL PRISION, TRIVANDRUM.

BY ADV. ADV.KURIKOSE (STATE BRIEF)

RESPONDENT/COMPLAINANT:

STATE OF KERALA REPRESENTED BY
A PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI. S. DILEEP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06/02/2007, ALONG WITH CRA NO. 1598 OF 2006 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NOS. 1377 & 1598 OF 2006

Dated this the 6th day of February, 2007

JUDGMENT

The appellants are accused Nos.2 and 1 in Sessions Case No.1168 of 2005 on the file of the Additional Sessions Court for trial of Abkari Act Cases, Neyyattinkara. Both the appellants faced trial for offence punishable under Section 55(a) and (i) of the Abkari Act.

2. The prosecution case against the appellants was that on 4.5.2004 PW.3, the Sub Inspector of Police, Nemom Police Station on getting information regarding sale of arrack in the property belonging to one Madhavan Nair @ Melom situated near Pamamcode Parayil Temple, went to the place of occurrence and found accused No.1, appellant in Crl. Appeal No.1598 of 2006, in possession of a 3 litre bottle containing 1 ½ litres of arrack and a glass tumbler and accused No.2, appellant in Crl. Appeal No.1377 of 2006, carrying a 35 litre white jerry can containing 30 litres of spirit, both engaged in the sale of arrack. It is the further case of the prosecution that on seeing the police party, accused No.1 abandoned the bottle and ran away from the place, accused No.2 was arrested on the spot and the contraband articles were seized on preparing Ext.P1 mahazar.

and both the accused were charge sheeted by the police. To prove the case against the appellants, the prosecution examined PWs.1 to 3 and produced Exts.P1 to P7 and MOs. 1 and 2. Ext.D1 was produced on the side of the defence. On closing the prosecution evidence, the appellants were questioned under Section 313 Cr.P.C. The appellants denied the allegations levelled against them. Accused No.1 stated that he was in jail in connection with another Abkari case of Kattakada Police Station and that he was arrested on production warrant. However, the trial court found both the appellants guilty under Section 58 of the Abkari Act, convicted them thereunder and sentenced them to undergo rigorous imprisonment for a period of 4 years each and to pay a fine of Rs.1,00,000/- each and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months each. Set off was also allowed against the substantive term of imprisonment. The above conviction and sentence are challenged in these appeals.

3. Both these appeals are filed through the jail authorities and a State Brief has been appointed in each appeal to defend the appellants. Heard the learned counsel appearing for the appellants as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellants have raised three contentions before this Court: (i) the trial court went wrong in finding the appellants guilty on the basis of the evidence of PWs.2 and 3 who were police officials and whose evidence was contradictory, (ii) PW.3, the Sub Inspector of Police violated the provisions of the Abkari Act and the provisions of the Kerala Excise Manual while seizing the contraband articles and taking samples for chemical analysis and (iii) the trial court had not considered the fact that the prosecution witnesses had not identified accused No.1 as the person who had ran away from the scene of occurrence.

5. The prosecution tried to prove the case against the appellants through the evidence of PWs.2 and 3. PW.3 was the Sub Inspector of Police, of Nemom Police Station who detected the crime. He stated that on getting information regarding sale of arrack, he went to the place of occurrence and found accused No.1 in possession of MO.2 bottle containing arrack and accused No.2 holding MO.1 plastic can containing spirit. He further stated that on seeing the police party, accused No.1 abandoned the bottle, jumped into the river and escaped from the place and accused No.2 was arrested. This witness also stated that the contraband articles were seized as per Ext.P1 mahazar and sample was taken from

both MOs.1 and 2 for chemical analysis and then the material objects were produced before the court. Ext.P7 is the certificate of chemical analysis. This witness also deposed that from the statement given by accused No.2, it was revealed that the person who escaped from the scene of occurrence was accused No.1. PW.3 further stated that he registered crime against both the accused and subsequently accused No.1 was arrested on production warrant.

6. The Head Constable who had accompanied PW.3 on the day of the incident was examined as PW.2. This witness also stated that when he and PW.3 reached the spot accused No.1abandoned the bottle containing arrack and escaped from the place. He also stated that accused No.2 was found holding a can which on examination was found to contain 30 litres of spirit. PW.2 further stated that accused No.2 informed that he was only an employee of accused No.1 and that the person who raw away from the spot was accused No.1.

7. The question to be considered, in the light of the contentions raised by the learned counsel for the appellants, is whether the evidence adduced by the prosecution is sufficient to identify accused No.1 and also to hold that the appellants were in possession of MOs. 1 and 2.

8. The evidence of PW.3 would show that when he reached the spot, he saw one person jumping into the river and he was told by accused No.2 that the person who fled from the scene of occurrence was accused No.1. PW.3 had no previous acquaintance with accused No.1. Further, Ext.P1 mahazar would show that the seizure of the contraband articles and taking of samples were witnessed only by PW.2, the Police Constable and no independent witness had signed Ext.P1. The only independent witness examined turned hostile to the prosecution. She stated that she had not seen either of the accused at the spot or seizure of the contraband articles as spoken to by PWs.2 and 3. Hence, the case of the prosecution that PW.3 seized MOs.1 and 2 in the presence of independent witness is doubtful.

9. The evidence of PW.2 would show that he was not in a position to identify accused No.1 as the person who had ran away from the scene of occurrence as he had no previous acquaintance with accused No.1. He also stated that there were houses nearby, but PW.3 had not called anybody to witness the action taken by him. When cross-examined, this witness stated that accused No.1 while escaping from the scene of occurrence threw away MO.2 bottle containing arrack and the glass into the river and

thereafter the bottle was taken from the river. It is to be noted that PW.3 had no such case. He stated that accused No.1 abandoned MO.2 bottle at the spot. PW.2 also stated that no independent witness was present at the time of detection of the crime. Hence, the evidence of PWs.2 and 3 alone is not sufficient to prove that MOs.1 and 2 were seized from the appellants.

10. With regard to the contention that PW.3 had not complied with the provisions of the Abkari Act and the Kerala Excise Manual while effecting seizure of the contraband articles and taking samples, the evidence of PW.2 is relevant. It is seen from the evidence of PW.2 that accused No.1 threw away MO.2 bottle and the glass into the river while escaping from the place. If that be so, sample could not have been taken from MO.2. Though the trial court found that there was no need to doubt the integrity of the witnesses, there is lack of evidence to prove that MOs.1 and 2 were seized from the appellants. Further, though PW.2 had stated that samples were taken by PW.3 and the same were sealed and labelled before sending to the court, it was reported that the samples were not seen produced in the court . In the above circumstances, this Court is of the view that the prosecution failed to prove that PW.3 complied with the provisions of the Abkari Act and the Kerala Excise Manual. Further, the prosecution case was that accused No.1 was arrested after about three

months from the date of occurrence and that too on production warrant. It has come out in evidence that accused No.1 was in jail in connection with another Abkari case. If that be so, it was the duty of the prosecution to explain how accused No.1 was involved in the present case. There was no explanation in this regard from PWs.2 and 3. It appears that the evidence adduced by the prosecution is not free of doubt. Hence, the appellants are entitled to the benefit of doubt.

11. On an overall appreciation of the entire evidence, this Court is of the view that the prosecution has not succeeded in proving the case against the appellants. In the above circumstances, the conviction and sentence ordered against the appellants are set aside and the appellants are found not guilty of the offence alleged against them. The appellants, accused Nos.2 and 1 in Sessions Case No.1168 of 2005 on the file of the Additional Sessions Court for trial of Abkari Act Cases, Neyyattinkara are acquitted. They shall be released forthwith, if they are not wanted in connection with any other case.

The Crl. Appeals are allowed as above.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A.NOS.1377 & 1598

OF 2006

JUDGMENT

6TH FEBRUARY, 2007.